SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1142

JAMES HENRY SMITH,
Petitioner

vs.

STATE OF NORTH CAROLINA,
Respondent

Petition for a Writ of Certiorari
To the Supreme Court of North Carolina

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INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of Facts	3
Reason for Granting Certiorari	5
Conclusion	9

CITATIONS

Cases	*Page*
Frank v. Mangum 237 U. S. 309 (1914)	6
Tenn. Code Ann. 40-2511	6
Walker v. United States 13 F (2d) 844 C. A. A. Tenn.	6
31 Am. Jur., *Jury* Sec. 242 (1958)	7
50 C. J. S., Juries Sec. 294 (1947)	7
Howard v. Texas 80 Tex. Cr. 588, 192 S. W. 770, LRA (1917) D 391	7
Am. Jur., Jury, Sec. 242 (1958)	7
Barney v. People, 22 Ill. 160 (1859)	7
Slaughter v. State 100 Ga. 323, 28 S. E. 159 (1897)	8
State v. Matthews 191 N. C. 387, 131 S. E. 743 (1926)	9
State v. Dry, 152 N. C. 813, 67 S. E. 1000 (1910)	9
Fed. R. Cim. P. 43	9
26 A. L. R. 2d, 785	9
State v. Holt 90 N. C. 749 (1894)	10

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina, dated and entered in the above cause of 14 December, 1966, in which no error was found in the trial of the petitioner in the Superior Court of North Carolina for the Twelfth Judicial District, wherein your petitioner was found guilty of second degree murder and received an active prison sentence of twelve to fifteen years.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina, which is printed in the Appendix hereto, is reported in 286 N. C. 659, 151 S. E. 2d 596.

JURISDICTION

The judgment of the North Carolina Supreme Court sought to be reviewed was dated and entered on 14 December, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3).

QUESTIONS PRESENTED

1. Is the failure to swear prospective jurors in a felony case to answer questions touching on their competency as jurors, and in failing to swear the jurors after they have been selected and impaneled to try the cause, a denial of due process within the meaning of the Fourteenth Amendment?

2. Does the failure of a defendant in a felony case to be present at the swearing of a jury to try his cause constitute a violation of due process within the meaning of the Fourteenth Amendment?

STATUTES INVOLVED

The Constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On Monday, April 25, 1966, at 10:00 A. M. in the Court House in the City of Raeford, North Carolina, Hoke County Superior Court was opened for trial of criminal cases, his Honor, Leo Carr, presiding and holding said Court according to law. All persons summoned to attend said term as jurors were asked to stand, and Bibles were distributed to them, and each juror summoned for the term placed his or her left hand on the Holy Bible, and raised his or her hand upward, whereupon the Clerk of the Hoke County Superior Court then administered the following oath: "You and each of you swear that you will well and truly try all issues in criminal actions which shall come before you during this term and true verdicts give according to the evidence thereon; so help you, God." It is not known whether your petitioner was physically present in the court room at the time the aforementioned oath was administered. The attorneys for your petitioner were not present. Thereupon the Solicitor duly began to call the docket of cases set for trial at the April 25, 1966 Criminal Term of Hoke County Superior Court. (R p 5).

Your petitioner was charged with first degree murder. On the call of the case, the Solicitor announced that the State would not seek a higher verdict than murder in the second degree or manslaughter as the facts might warrant.

After the jury had been selected, the Clerk made the following statement: "Members of the jury, you have been sworn and are now impaneled to try this action wherein the State of North Carolina is the plaintiff and James Henry Smith is the defendant; sit together, hear the evidence, and render your verdict accordingly." The jurors were not sworn to answer questions touching their competency to serve as jurors, nor were the jurors sworn to try the case after they had been selected and impaneled, no Bibles being

distributed to the jurors at either time and no oath being administered (R p 6).

Your petitioner was tried and the jury subsequently returned a verdict of "guilty of murder in the second degree." Your petitioner moved the Court that there be a new trial for errors committed in the course of the trial. This motion was denied and your petitioner excepted. Your petitioner then moved for an arrest of judgment. This motion was denied and your petitioner excepted. (R p 129).

It was not specifically pointed out to the trial court that your petitioner contended that the jurors had not been properly sworn inasmuch as your petitioner and his counsel were not aware of this at that time.

The trial court then entered judgment as follows:

> "It is the judgment of the Court that the defendant be confined in the State's Prison not less than twelve nor more than fifteen years." (R p 130).

Your petitioner then took exception to the judgment and gave notice of appeal to the Supreme Court of North Carolina. Upon appeal to the Supreme Court of North Carolina, your petitioner made assignments of error including the following:

ASSIGNMENT OF ERROR #1

> The defendant-appellant assigns as error the failure of the Court to swear the jurors to answer questions touching on their competency as jurors and the failure of the Court to swear the jurors to try the cause after they had been selected and impaneled to try the cause (R p 131).

ASSIGNMENT OF ERROR #15

> The defendant-appellant assigns as error the ac-

tion of the Court in denying defendant's motion in arrest of judgment. (R p 136).

ASSIGNMENT OF ERROR #16

The defendant-appellant assigns as error the action of the Court in entering judgment. (R p 136).

The Supreme Court of North Carolina found no error in the trial.

REASON FOR GRANTING CERTIORARI

There appears to be no doubt that a jury must be sworn in a criminal case; otherwise the trial results in a nullity. This was true at common law, and is apparently the law today in the federal courts and all the state courts, including that of North Carolina. It is contended that the practice of swearing juries is so deeply entrenched in American jurisprudence that the failure to swear a jury in a criminal matter, particularly a felony case, would be a denial of due process within the meaning of the Fourteenth Amendment.

While it is true that the Constitution of the United States does not guarantee to its citizens a trial by jury in state courts, when a state provides for a jury trial it should not be excused for violating a citizen's rights under the Fourteenth Amendment.

If the swearing of a jury is indispensible to its validity it follows that there must be some minimum requirements consistent with due process concerning:

(1) Whether the oath must be administered after jurors have been selected and impaneled in a particular case.

(2) Whether it is necessary to swear the prospective

jurors to answer questions touching on their competency to serve as jurors.

(3) Whether the oath should state that the juror meets all of the qualifications under state (or federal) law.

(4) Whether the defendant must be present at the administration of such oath or oaths.

It is conceded that a State has the right to prescribe procedural details in jury trials, including the administration of the jurors' oath, but it is contended that where there is a material departure from the minimum requirements in administering the oath, the defendant has had his essential rights of notice or opportunity to be heard by a competent tribunal interfered with in deprivation of due process within the meaning of the Fourteenth Amendment. *Frank v. Mangum*, 237 U. S. 309 (1914).

This writer has failed to find any case wherein this court has discussed the question of swearing the jury in either state or the U. S. Courts. Nor has there been found any guidance on the subject in the *Federal Rules of Criminal Procedure* or the rules of District Courts examined. The general index of *The U. S. Code Annotated* under "Oaths and Affirmations" has approximately 250 headings but no heading pertaining to a jury oath. The only federal case found which discusses the matter is *Walker v. United States*, 13 F (2d) 844, C. A. A. Tenn., Cert. den. 273 U. S. 726 (1926), wherein the Court in a dictum disapproved the Tennessee practice of swearing the jurors of the regular panel in a wholesale way at the opening of the term and not swearing them to specifically try a particular case after they are selected therefor. The present Tennessee statute provides that ". . . The court shall not swear any of the jurors until the whole number are selected for a jury." *Tenn. Code Ann. 40-2511.*

It is clear that at common law it was necessary to administer *two* oaths to a prospective juror: (1) the *voir dire* as to his qualifications to serve as a juror, and (2) to try the particular case before the court. The overwhelming weight of authority is that the jury must be sworn *after* they have been selected to try a particular case and that a general swearing at the commencement of the term is insufficient. 31 Am. Jur., *Jury,* Sec. 242 (1958); 50 C.J.S., *Juries* Sec. 294 (1947). *Howard v. Texas,* 80 Tex. Cr. 588, 192 S W 770, LRA 1917 D 391.

After a diligent search by this writer it appears that only Alabama, Mississippi and North Carolina deviate from the requirement that in a felony case (non-capital) a jury must be sworn after it is selected and impaneled to try a particular case.

It is contended on behalf of your petitioner herein that the failure to swear the *jurors* after they have been selected to try a particular case violates your petitioner's constitutional rights under the Fourteenth Amendment. At a general swearing of prospective jurors at the beginning of a term, they do not know the identity of the defendants nor the nature of the charges against such defendants. It is entirely possible that a prospective juror could take an oath as to one defendant but not as to another.

The reason for the necessity of swearing the jury for an individual case was well put by a court in the case of *Barney v. People,* 22 Ill. 160, (1859):

> "Although this practice may have prevailed in some states, at least in civil causes, it is opposed to the uniform practice in this state, and cannot meet with our approval. With some jurors and in some cases, too much solemnity cannot be observed in the conduct of a trial. The solemnity of calling the juror before the prisoner in the

> presence of the court and his there taking the solemn oath prescribed by the law, to well and truly try and true deliverance make of that prisoner, not only gives the prisoner a comfortable assurance that he is to have a fair and impartial trial, but has a salutary tendency to prepare the mind of the juror for the solemn duty he is assuming."

Referring to the practice of swearing all jurors at the beginning of the term, it is stated in *Slaughter v. State,* 100 Ga. 323, 28 S. E. 159 (1897):

> "This too much resembles the practice of the economical deacon who blessed the pork barrel instead of asking a blessing at each meal."

Your petitioner's case had not been called at the time that the general oath was administered to prospective jurors at the beginning o fthe term at which he was tried, and the record shows that it is not known whether he was even in the courtroom. His attorneys were not present.

Even if it is determined that the oath administered the prospective jurors was sufficient so as not to deprive your petitioner of due process of law under the Fourteenth Amendment, it is contended that your petitioner's absence at the time said oath was administered would deprive him of due process.

Consistent with a majority of the states, North Carolina has held that a defendant has a right to be physically present throughout the trial. "In every criminal prosecution it is the right of the accused to be present throughout the trial. In misdemeanors, this right can be waived by the defendant with the consent of the Court, through his counsel. In felonies other than capital, the right to be present can be waived only by the party himself." *State v.*

Matthews, 191 N. C. 378, 131 S. E. 743, (1926), and cases cited therein; *State v. Dry,* 152 N. C. 813, 67 S. E. 1000, (1910). This is likewise the rule in Federal Court, the impaneling of the jury being specifically mentioned as a stage of the proceedings. *Fed. R. Crim.* P. 43.

It could hardly be argued that the swearing of a jury is not a step in the progress of the trial. While several cases have held that it is not error to swear jurors as to their qualifications in the absence of the accused, the overwhelming weight of authority is to the effect that in criminal cases, the accused has a right to be present when the jury is sworn. See cases cited in 26 A. L. R. 2d, 785. It is obvious that when a panel of jurors is sworn on a Monday morning at the beginning of a term a number of defendants whose cases are docketed to be tried will not be in the courtroom, some being incarcerated, others consulting with their counsel or other parties in rooms adjacent to the courtroom, and still others not being required to be present until a later day in the week. These defendants not present in the court when the general oath is administered to the jurors have missed an integral step of *their* trial.

CONCLUSION

When a group of prospective jurors were sworn to try your petitioner's case before they were even selected as jurors to try said case, and without knowing the identity of your petitioner nor the nature of the charges or any of the circumstances of the case, and at a time when your petitioner and his attorneys were not physically present before the Court, and when such persons are not specifically sworn as to their qualifications to be jurors, nor to answer questions that may be put to them concerning their competency to be jurors, there has been such a departure from the solemn jurors' oath as was originally intended and used

as to render this procedure meaningless. A very real question exists as to whether your petitioner's rights under the due process clause of the Fourteenth Amendment have been violated as he contends.

The questions raised herein have been the subject of much litigation in the State Courts for more than a hundred years. The petition for a writ of certiorari should be granted to settle these questions of obvious importance in every felony trial in the United States.

The need for protecting the right to a proper trial by jury was well stated in the case of *State vs. Holt* 90 N. C. 749 (1894).

> "A greater danger arises from practices and precedents that insidiously gain a foothold and power in courts of justice by inadvertence and lack of due consideration. The great importance of trial by jury is sometimes lost sight of, even in courts of justice, in the disposition of petty misdemeanors, cases of no great moment, and what are called 'plain cases.' In the economy of time, the hurry of business, lack of attention, hasty consideration, irregular and unwarranted methods of trial are adopted, allowed, tolerated and thus vicious practices spring up, creating sources of danger to constitutional right.
>
> "It is the province and the duty of the courts to keep strict watch over and protect fundamental rights, in all matters that come before them. Those who administer the law should never forget that decided cases make precedents, precedents oftentimes of little moment in themselves, but which in their accumulated power may, in

some emergency, overturn principle and subvert the rights of many people."

Respectfully submitted,

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March 13, 1967